

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

HEIDI C. WOODSUM,

Plaintiff,

V.

CAROLYN W. COLVIN, Acting Commissioner
of Social Security,

Defendant.

Case No. C16-5219-RAJ

ORDER REVERSING AND REMANDING CASE FOR FURTHER ADMINISTRATIVE PROCEEDINGS

Heidi C. Woodsum seeks review of the denial of her application for Supplemental

Security Income. Ms. Woodsum contends the ALJ erroneously (1) failed to consider her

physical impairments at step two, and (2) evaluated the examining opinions of Terilee Wingate, Ph.D. and her own testimony. Dkt. 11 at 1. Ms. Woodsum contends these errors resulted in a residual functional capacity (RFC) determination that failed to account for all of her limitations.

Id. As discussed below, the Court **REVERSES** the Commissioner's final decision and

REMANDS the matter for further administrative proceedings under sentence four of 42 U.S.C. § 405(g).

BACKGROUND

In August 2012, Ms. Woodsum applied for benefits, alleging disability as of May 19,

1 2011. Tr. 12, 267-78. Ms. Woodsum's application was denied initially and on reconsideration.
2 Tr. 145-58, 157-68. After the ALJ conducted a hearing on September 17, 2014, the ALJ issued a
3 decision finding Ms. Woodsum not disabled. Tr. 12-22.

4 **THE ALJ'S DECISION**

5 Utilizing the five-step disability evaluation process,¹ the ALJ found:

6 **Step one:** Ms. Woodsum has not engaged in substantial gainful activity since August 27,
7 2012, the application date.

8 **Step two:** Ms. Woodsum has the following severe impairments: Major depressive
9 disorder; posttraumatic stress disorder (PTSD).

10 **Step three:** These impairments do not meet or equal the requirements of a listed
11 impairment.²

12 **Residual Functional Capacity:** Ms. Woodsum can perform a full range of work at all
13 exertional levels but with the following nonexertional limitations: She is limited to
14 simple, unskilled work. She can have occasional public contact and occasional coworker
15 contact with no teamwork.

16 **Step four:** Ms. Woodsum has no past relevant work.

17 **Step five:** As there are jobs that exist in significant numbers in the national economy that
18 Ms. Woodsum can perform, she is not disabled.

19 Tr. 12-22. The Appeals Council denied Ms. Woodsum's request for review making the ALJ's
20 decision the Commissioner's final decision. Tr. 1-7.³

21 **DISCUSSION**

22 **A. Step 2 Consideration of Physical Impairments**

23 Ms. Woodsum argues the ALJ harmfully erred at step two in evaluating her physical
24 impairments. The Court disagrees.

¹ 20 C.F.R. §§ 404.1520, 416.920.

² 20 C.F.R. Part 404, Subpart P, Appendix 1.

³ The rest of the procedural history is not relevant to the outcome of the case and is thus omitted.
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1 The Social Security Act (Act) defines “disability” as the “inability to engage in any
2 substantial gainful activity by reason of any medically determinable physical or mental
3 impairment which can be expected to result in death or which has lasted or can be expected to
4 last for a continuous period of not less than 12 months[.]” 42 U.S.C. §§ 423(d)(1)(A),
5 1382c(a)(3)(A). At step two of the sequential evaluation, the Commissioner must determine
6 “whether the claimant has a medically severe impairment or combination of impairments.” *See*
7 *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996); 20 C.F.R. § 404.1520(a)(4)(ii). The
8 claimant has the burden to show that (1) she has a medically determinable physical or mental
9 impairment, and (2) the medically determinable impairment is severe. *See Bowen v. Yuckert*,
10 482 U.S. 137, 146 (1987). A “physical or mental impairment” is an impairment that results
11 from anatomical, physiological, or psychological abnormalities which are demonstrable by
12 medically acceptable clinical and laboratory diagnostic techniques.” 42 U.S.C. §§ 423(d)(3),
13 1382c(a)(3)(D). Thus, to establish the existence of a severe impairment, the claimant must
14 provide medical evidence consisting of signs, symptoms, and laboratory findings. 20 C.F.R. §
15 404.1508. However, “[r]egardless of how many symptoms an individual alleges, or how
16 genuine the individual’s complaints may appear to be, the existence of a medically determinable
17 physical or mental impairment cannot be established in the absence of objective medical
18 abnormalities; i.e., medical signs and laboratory findings[.]” *Ukolov v. Barnhart*, 420 F.3d
19 1002, 1005 (9th Cir. 2005) (quoting SSR 96-4p).

20 In addition to producing evidence of a medically determinable physical or mental
21 impairment, the claimant bears the burden at step two of establishing that the impairment or
22 impairments is “severe.” *See Bowen*, 482 U.S. at 146. An impairment or combination of
23 impairments is severe if it significantly limits the claimant’s physical or mental ability to do

1 basic work activities. 20 C.F.R. §§ 404.1520(c), 404.1521(a). “The step two inquiry is a de
 2 minimus screening device to dispose of groundless claims.” *Id.* An impairment or combination
 3 of impairments may be found “‘not severe’ only if the evidence establishes a slight abnormality
 4 that has ‘no more than a minimal effect on an individual’s ability to work.’” *Smolen*, 80 F.3d at
 5 1290 (citing *Yuckert v. Bowen*, 841 F.2d 303, 306 (9th Cir. 1988)). However, the claimant has
 6 the burden of proving his “impairments or their symptoms affect [his] ability to perform basic
 7 work activities.” *Edlund v. Massanari*, 253 F.3d 1152, 1159-60 (9th Cir. 2001).

8 Ms. Woodsum argues that that the record shows she has a history of chronic shoulder
 9 pain and “imaging of her cervical and thoracic spine showed widespread degeneration.”⁴ Dkt.
 10 11 at 13. First, although there are mentions of “shoulder pain” in the record these findings do not
 11 appear to be based upon or supported by objective medical abnormalities; i.e., medical signs and
 12 laboratory findings.⁵ Ms. Woodsum’s symptom complaints alone are insufficient to establish a
 13 medically determinable physical or mental impairment. *See Ukolov*, 420 F.3d at 1005; 20 C.F.R.
 14 § 416.929; SSR 96-4p. Second, even if this evidence were sufficient to establish a medically
 15 determinable impairment, a diagnosis, without more, is insufficient to establish a severe
 16 impairment. *See, e.g., Bowen*, 482 U.S. at 146; *Febach v. Colvin*, 580 F. App’x. 530, 531 (9th
 17 Cir. 2014) (a “diagnosis alone is insufficient for finding a ‘severe’ impairment”). Ms. Woodsum
 18 fails to point to any evidence indicating that either her alleged shoulder or back impairments

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 20 ⁴ Ms. Woodsum also indicates that the ALJ failed to mention migraines in his written decision or
 21 factor in their functional effects. Dkt. 11 at 13. However, there appear to be only a few isolated
 22 mentions of migraines in the record and no evidence that they have a functional impact on Ms.
 23 Woodsum’s ability to perform basic work activities. *See, e.g., Tr. 677, 748.*

⁵ There are a few mentions of shoulder pain apparently related to a motor vehicle accident in
 October 2012 as well as some mentions of shoulder pain prior to the accident. *See, e.g., Tr. 361,*
 369, 534, 553, 559, 565, 567-69, 571, 611, 613, 634, 648. However, other than references to
 “shoulder pain” there are no medical signs or laboratory findings in the record establishing the
 underlying cause of Ms. Woodsum’s complaints of shoulder pain.

1 affected her ability to perform basic work activities.⁶ *See Edlund*, 253 F.3d at 1159-60. Ms.
 2 Woodsum did not cite back, neck or shoulder problems as limiting her ability to work in
 3 response to the ALJ's inquiry at the hearing. Tr. 34-36. Rather, Ms. Woodsum cited only
 4 mental health issues as impairments preventing her from working. *Id.* Moreover, Ms. Woodsum
 5 does not point to any clinical findings in the record indicating the presence of any significant
 6 work-related limitations stemming from her alleged physical impairments.

7 Ms. Woodsum also argues that the ALJ "should have pursued an investigation of the
 8 severity of [her] chronic shoulder pain." Dkt. 11 at 13. The ALJ's duty to develop the record is
 9 triggered "when there is ambiguous evidence or when the record is inadequate to allow for
 10 proper evaluation of the evidence." *Mays v. Massanari*, 276 F.3d 453, 460 (9th Cir. 2001).
 11 However, this principle cannot be used to shift the claimant's burden of proving disability to the
 12 ALJ. *Id.* at 460 (noting it is the claimant's "duty to prove she was disabled" and she cannot
 13 "shift her own burden" to the ALJ by virtue of the ALJ's duty to develop the record). Here, Ms.
 14 Woodsum fails to point to clinical evidence indicating that her alleged shoulder impairment
 15 affected her ability to perform basic work activities. Requiring the ALJ to further "investigate"
 16 in this circumstance would improperly shift the burden of establishing disability from Ms.
 17 Woodsum to the ALJ.

18 Accordingly, Ms. Woodsum fails to establish the ALJ harmfully erred at step two in
 19 evaluating her physical impairments.

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 21 ⁶ There is a treatment note from a follow-up appointment in December 2012, about a month after
 22 Ms. Woodsum's motor vehicle accident, in which pain, stiffness and some reduced range of
 23 motion is noted in Ms. Woodsum's shoulders. Tr. 401. However, subsequent records make no
 mention of continued reduced range of motion and on examination in November 2013, Ms.
 Woodsum denied any chronic pain and a review of her musculoskeletal systems was found to be
 normal. Tr. 677.

B. Consideration of Polysubstance Abuse and the Drug Addiction and Alcoholism (DAA) Analysis

Ms. Woodsum contends the ALJ erred in evaluating Dr. Wingate's examining opinions as well as her own testimony. However, the Court does not discuss these contentions in detail because, as discussed below, the ALJ's decision suffers from a more fundamental legal error requiring remand for further proceedings: the failure to properly analyze Ms. Woodsum's substance abuse.

The Court may set aside the Commissioner's denial of disability benefits where the ALJ committed legal error. *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Where there is significant evidence of alcohol and drug use in the record, as there is in this case, the ALJ must conduct a specific drug addiction and alcoholism (DAA) analysis to determine whether a claimant's disabling limitations remain absent the use of drugs or alcohol.

The regulations provide that if DAA is a contributing factor material to the determination of disability, a claimant cannot be considered disabled for purposes of awarding benefits. *See* 42 U.S.C. § 1382c(a)(3)(J); 20 C.F.R. §§ 404.1535 and 416.935. Thus, when DAA is present, the Ninth Circuit has established a specific procedure that must be applied to determine whether DAA is a contributing factor material to the determination of disability. *See* 20 C.F.R. §§ 404.1535 and 416.935; *Bustamante v. Massanari*, 262 F.3d 949, 955 (9th Cir. 2001). First, the ALJ must complete the five-step disability analysis described above without separating out the effects of DAA. *See Bustamante*, 262 F.3d at 956 (remanding “with instructions that the ALJ proceed with step three (and four and five, if necessary) of the disability determination without attempting to separate out the impact of … alcohol abuse.”). If the ALJ finds the claimant is not disabled under the five step inquiry, then the claimant is not entitled to benefits and there is no

1 need to proceed with the analysis regarding DAA under 20 C.F.R. §§ 404.1535 or 416.935. *Id.*
2 On the other hand, if the ALJ finds the claimant disabled without separating out the impacts of
3 DAA, the ALJ must then perform the sequential evaluation process a second time, separating out
4 the impact of the DAA, to determine whether she would remain disabled if she stopped using
5 drugs or alcohol. *See id.; Bustamante*, 262 F.3d at 956. If the ALJ finds the claimant's
6 remaining limitations are disabling after completing that second evaluation, then DAA is not a
7 contributing factor material to the determination of disability and the claimant is disabled. 20
8 C.F.R. §§ 404.1535(b)(2)(ii), 416.935(b)(2)(ii). On the other hand, if after the second evaluation
9 the ALJ determines a claimant's remaining limitations would not be disabling, the ALJ must find
10 that the claimant's DAA is a contributing factor material to the determination of disability and
11 the claimant is not disabled. 20 C.F.R. §§ 404.1535(b)(2)(ii), 416.935(b)(2)(i).

12 Here, the ALJ found major depressive disorder and PTSD to be severe impairments at
13 step two. The ALJ did not specifically include substance abuse as a severe impairment at step
14 two. However, polysubstance abuse is diagnosed repeatedly by acceptable medical sources
15 throughout the record. *See, e.g.*, Tr. 400, 438, 444, 478, 487, 534, 537-38, 539-40, 640, 678,
16 748. Moreover, the ALJ's findings clearly indicate that substance abuse had a significant impact
17 on Ms. Woodsum's mental impairments and that the ALJ attempted to improperly factor out the
18 effects of substance abuse prematurely in finding Ms. Woodsum not disabled on his initial five-
19 step evaluation. This is evidenced by the ALJ's determination that "objective medical evidence
20 shows that exacerbations in [Ms. Woodsum's] ... alleged mental health symptoms are caused by
21 her substance abuse[.]" Tr. 16. It is further evidenced by the fact that the ALJ discounted Dr.
22 Wingate's examining opinion, which assessed various marked limitations in mental functioning,
23 in part, on the grounds that it "completely fails to take into account the claimant's substance

1 abuse and the impact it has on her mental impairments.” Tr. 20, 370-73, 757-64.

2 These findings, and the ALJ’s analysis as a whole, indicate that he considered substance
3 abuse to be more than a slight abnormality and to have more than a *deminimus* effect on Ms.
4 Woodsum’s ability to function. As such, in the first instance, the ALJ should have evaluated the
5 severity of Ms. Woodsum’s polysubstance abuse at step two. Moreover, given that substance
6 abuse plays a significant role in the ALJ’s evaluation of the evidence, the ALJ was required to
7 conduct a specific DAA analysis. 20 C.F.R. §§ 404.1535, 416.935; 42 U.S.C. § 423(d)(2)(C).
8 Here, the ALJ erred in failing to do so. The ALJ did not mention or discuss the application of a
9 DAA analysis in his decision. As noted above, the ALJ was required to conduct the five-step
10 inquiry without first determining the impact of substance abuse on Ms. Woodsum’s other
11 impairments. *See Bustamante*, 262 F.3d 949. Instead, as evidenced by the findings mentioned
12 above, the ALJ improperly conducted the initial five-step inquiry prematurely separating out the
13 impact of DAA on Ms. Woodsum’s mental impairments.

14 In sum, although substance abuse was a major consideration in the ALJ’s nondisability
15 determination, the ALJ erred by failing to apply the regulations and Ninth Circuit case law
16 requiring the ALJ to apply a specific two-step DAA analysis. This error is not harmless as it
17 renders the ALJ’s findings here unreliable. Remand is required because the Court cannot itself
18 apply the five-step disability inquiry, including the two-step substance abuse analysis. Rather it
19 is the role of the ALJ, not the Court, to properly evaluate Ms. Woodsum’s disability claim. *See*,
20 *e.g.*, *Securities and Exchange Commission v. Chinery Corp.*, 332 U.S. 194, 196 (1947)
21 (emphasizing “a simple but fundamental rule of administrative law” that “a reviewing court, in
22 dealing with a determination or judgment which an administrative agency alone is authorized to
23 make, must judge the propriety of such action solely by the grounds invoked by the agency” and

1 “[i]f those grounds are inadequate or improper, the court is powerless to affirm the
 2 administrative action by substituting what it considers to be a more adequate or proper basis.”).
 3 Moreover, the Court need not address Ms. Woodsum’s other claimed errors because they occur
 4 in the context of a disability determination that failed to follow the proper disability procedures
 5 and analysis. Because, in this case, Ms. Woodsum’s claims of error with respect to Dr.
 6 Wingate’s opinions and her own testimony are “inextricably intertwined” with her substance
 7 abuse, it is appropriate for the Court to remand for the ALJ to separate out the impact of
 8 substance abuse through a proper DAA analysis. *Elmore v. Astrue*, 2012 WL 3240285 (W.D.
 9 Wa., July 16, 2012) (holding the Court need not reach claimant’s other assignments of errors
 10 because they are inextricably intertwined with the claimant’s substance abuse and it was
 11 appropriate for the Court to leave it to the Commissioner to “untangle” the impact of substance
 12 abuse).⁷

13 The Court is aware that the parties did not specifically challenge the ALJ’s failure to
 14 apply the two-step DAA analysis.⁸ Normally, the Court need not address errors that are not
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16 ⁷ Although the Court need not necessarily reach the issue in light of the ALJ’s error in applying
 17 the DAA analysis, the Court notes that the ALJ also improperly discounted Dr. Wingate’s
 18 August 2012 and June 2014 opinions as based primarily on Ms. Woodsum’s self-reports. *See*
 19 *Ghanim v. Colvin*, 763 F.3d 1154, 1162 (9th Cir. 2014) citing *Tommasetti v. Astrue*, 533 F.3d
 20 1035, 1041 (9th Cir. 2008) (“If a treating provider’s opinions are based ‘to a large extent’ on an
 21 applicant’s self-reports and not on clinical evidence, and the ALJ finds the applicant not credible,
 22 the ALJ may discount the treating provider’s opinion.”). Here, in addition to Ms. Woodsum’s
 23 self-reported symptoms, Dr. Wingate’s opinions were based on mental status examinations
 (MSE), clinical interviews and her own personal observations. Tr. 373-74, 760-61. Contrary to
 the ALJ’s finding, there is no indication Dr. Wingate relied more heavily on Ms. Woodsum’s
 self-reports than on her clinical observations in reaching her opinions. *See Ghanim*, 763 F.3d at
 1162 (“[W]hen the opinion is not more heavily based on a patient’s self-reports than on clinical
 observations, there is no evidentiary basis for rejecting the opinion.”). Moreover, the Court
 agrees with Ms. Woodsum that the ALJ erred in failing to address Dr. Wingate’s November
 2011 opinion entirely and that, in reevaluating the evidence and applying the proper DAA
 analysis on remand, the ALJ should also address that opinion. Dkt. 11 at 9; Tr. 360-63.

8 Ms. Woodsum did, however, challenge the ALJ’s rejection of Dr. Wingate’s opinions based on
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1 specifically and distinctly argued. However, the ALJ's failure to apply the proper DAA analysis
 2 is in the nature of a structural error and central to the validity of the disability determination
 3 process.⁹ Moreover, even if considered under a harmless error analysis, the ALJ's "muddled
 4 consideration" of Ms. Woodsum's substance abuse prevents a clear determination that the error
 5 was harmless. *Woolery v. Colvin*, 2013 WL 3294890 (W.D. Wash. June 28, 2013) (finding the
 6 ALJ erred in failing to conduct a proper DAA analysis and that "the ALJ's muddled
 7 consideration of plaintiff's alcohol abuse prevents a clear finding that the ALJ's error was
 8 harmless."); *see Malone v. Comm'r of Soc. Sec. Admin.*, 2014 WL 3871214 (D. Or. August 5,
 9 2014) ("The court cannot say the instant error [in failing to follow the two-step DAA analysis]
 10 was harmless, because the ALJ considered the same type of substance-abuse-related evidence
 11 which, by law, she was precluded from considering in the initial sequential analysis."). As noted
 12 above, the ALJ's failure to apply the proper DAA analysis in this case renders his findings
 13 unreliable which, in turn, renders proper consideration of Ms. Woodsum's other claimed errors
 14 problematic. As such, the ALJ's failure to apply the proper DAA analysis in this case is an
 15 appropriate basis to remand this matter for further proceedings.

17 CONCLUSION

18 For the foregoing reasons, the Commissioner's final decision is **REVERSED** and this

19 her failure to account for the impact of substance abuse on Ms. Woodsum's mental impairments.
 Dkt. 11 at 10-11.

20 ⁹ "Structural errors are defects affecting the framework within which an adjudication proceeds,
 rather than an error that occurred in an otherwise proper proceeding." *Hanif v. Astrue*, 2011 WL
 21 6140867 (W.D. Wash., Nov. 18, 2011) (citing *Neder v. United States*, 527 U.S. 1, 8, 119 S.Ct.
 1827, 144 L.Ed.2d 35 (1999)). Moreover, "while structural errors have typically been analyzed
 22 in the context of criminal matters, the Ninth Circuit has stated '[w]e do not hold that an error in a
 23 civil context can never be structural.'" *Id.* (quoting *Al Haemain Islamic Foundation Inc. v. U.S.*
Dept. of Treasury, 660 F.3d 1019, 1042 (9th Cir. 2011) *amended and superseded by* 686 F.3d
 965 (2012)).

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1 case is **REMANDED** for further administrative proceedings under sentence four of 42 U.S.C. §
2 405(g).

3 On remand, the ALJ should evaluate the severity of polysubstance abuse at step two and
4 proceed with a proper five-step disability determination without attempting to separate out the
5 impact of Ms. Woodsum's substance abuse. Only if the ALJ determines Ms. Woodsum is
6 disabled under the five-step inquiry, should the ALJ go on to consider whether substance abuse
7 is a contributing factor material to that determination. In applying the proper DAA analysis, the
8 ALJ shall also reevaluate the medical evidence, Ms. Woodsum's testimony, and develop the
9 record as needed.

10 DATED this 30th day of December, 2016.

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14 The Honorable Richard A. Jones
United States District Judge
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